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ABSTRACT

This booklet reviews a broad array of factors affecting the immunity of school board members from personal liability for the results of their official acts. Among the factors examined are the federal doctrine of limited immunity as it applies to state officials; the possible extension of absolute immunity to school boards; the conditions under which school boards as official bodies that are legally constituted "persons" may be liable for their actions (according to the findings of the United States Supreme Court in "Monell v. New York City Department of Social Services"); the extent to which neglecting to prevent the unconstitutional activities of others may make the board member liable; and legal waivers of state sovereign immunity. Also addressed are procedural considerations relating to court litigation in cases involving claims of immunity; special immunity in cases involving claims of libel or slander; and claims under state law. The booklet also considers the damages to which board members may be subject, notes interesting cases in which the immunity doctrine has been applied, and points out nine actions that boards can take to reduce or avoid liability. (PGD)

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LEGAL LIABILITY OF SCHOOL BOARD MEMBERS

REVISED EDITION

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LEGAL LIABILITY OF SCHOOL BOARD MEMBERS

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FOREWORD

NSBA's Council of School Attorneys presents this revised edition of the *Legal Liability of School Board Members* for the use of both attorneys and school board members. Just as the first edition published in 1981 proved to be a useful primer on board member liability issues, this updated version will no doubt serve equally well.

As the author notes in his opening paragraph, "school board membership is a hazardous business." In times past school board members could devote themselves exclusively to educational concerns such as curriculum, testing, etc. Today they need a law degree and a prophesier to assure they are not treading on some newly discovered constitutional right of the school district's teachers or students. Furthermore, as a result of recent court decisions, the individual assets of school board members are now in jeopardy, making the task of managing the schools even more precarious.

This publication will provide to both attorneys and school board members a quick historical reference on the state of the law in this area, coverage of the most recent developments in the law, and some pointers for avoiding school board member liability.

The author, E. Freeman Leverett, is one of the most respected school lawyers in Georgia. He practices law with the Elberton, Georgia, firm of Heard, Leverett, Adams & Jenkins. Mr. Leverett is also General Counsel for the Georgia School Boards Association and has served as Chairman of the NSBA Council of School Attorneys.

We offer this newly revised edition of *Legal Liability of School Board Members* to board members and their counsel in hopes of easing the burden imposed by the law on board members, so that more time can be devoted to the ultimate goal of providing a high quality education to every public school student.

Gerald A. Caplan
Chairman
Council of School Attorneys

September 1985

LEGAL LIABILITY OF SCHOOL BOARD MEMBERS

THE PROBLEM

School board membership is a hazardous business. It is now commonplace for courts to award personal judgments impacting upon the individual resources of board members. To an even greater extent, board members have to bear the trouble, worry and legal expense of defending many groundless suits without any reasonable hope of reimbursement after the court vindicates their actions. Although courts refuse to impose personal liability in most cases, this does not alter the fact that the issue usually cannot be determined until after a full-scale trial, often involving several years of court hearings, depositions, trials and incalculable expense and inconvenience.

Twenty-five years ago, law suits seeking recovery against the individual resources of school board members were virtually unheard of. Two legal developments have spurred this rather sudden change of circumstances.

First, decisions of the federal courts have delineated an entirely new horde of federal constitutional rights, such as teacher dismissal and non-renewal, student suspension, campus First Amendment rights, and maternity leave, to name only a few. Added to this, Congress has enacted a flurry of statutes such as Title VII (FEPC), Title VI, and more recently, § 504 of the Rehabilitation Act, 20 U.S.C. §794, and the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 *et seq.*, the parameters of which yet remain to be fully defined in the damages field. Some courts have even recognized a new action, educational malpractice,[1] under which the potential for personal liability is staggering. It also appears that we may be on the threshold of the development of a new federal common law of constitutional negligence.[2]

Second, a decision of the United States Supreme Court in 1975,[3] although upholding a limited immunity for school officials, has nevertheless served to focus attention on the fact that school board members *may* be liable, and has thereby served as a stimulus for claims based on the newly-evolved federal rights.

In short, there has been litigation defining both the *right* and the *remedy*, and given the current propensity of Americans to sue, the sudden rash of litigation against school board members hardly comes as a surprise.

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[1] Hoffman v. Board of Education, 410 N.Y.S. 2d 99 (1978), *rev'd*, 49 N.Y.2d 121, 424 N.Y.S.2d 376, 460 N.E.2d 317 (1979); Donohue v. Copiague School District, 47 N.Y.2d 440, 418 N.Y.S.2d 375, 391 N.E.2d 1352 (1979).

[2] Leite v. City of Providence, 463 ESupp. 585, (D. R.I. 1978); Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979); *compare* Procunier v. Navarette, 434 U.S. 555, 566 (1978); Parratt v. Taylor, 451 U.S. 527 (1981).

[3] Wood v. Strickland, 420 U.S. 308 (1975).

BACKGROUND

The personal liability of school board members, and public officials in general, is not new. At common law, personal immunity of public officials and employees did not exist,[4] despite the equally well-settled rule of sovereign immunity. While the Crown could not be held vicariously liable for the wrongful acts of its servants, the servants were nevertheless liable for their own acts under the rule of the law of agency, holding an agent liable for his own wrongful acts.[5]

The proposition was never stated so strongly as in Lord Mansfield's decision in *Mostyn v. Fabrigas*:[6]

> Therefore to lay down in an English court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

But because it was the judges who declared what the law was, it is not surprising to find that at an early date, they carved out an exception for themselves, and established the doctrine of judicial immunity.[7] Under this exception, judges enjoy an absolute immunity for their acts, even when the judge acts erroneously, maliciously, corruptly, or in excess of jurisdiction. Only where a judge acts "in the clear absence of all jurisdiction" does he lose his immunity.[8] The same immunity extends to prosecuting attorneys.[9]

The rationale for the immunity is that it exists "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[10]

In due course, particularly in the federal system, the courts came to recognize that the same considerations should apply to public officials other than judges, and consequently, a principle of limited or qualified immunity began to emerge. In general, the test was stated in terms of "acting in good faith and with probable cause."[11] Although in one case the Supreme Court did apply a rule of absolute immunity to a high executive official in the federal government sued for libel,[12] in a more recent decision in 1978, the Court declared that "in a suit for damages arising from unconstitutional actions, federal executive officials exercising discretion are entitled only to the qualified immunity... subject to those excep-

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[4] Webb v. Hennessy, 150 Ga. App. 326, 257 S.E.2d 315 (1979), *rev'd*, 245 Ga. 329, 264 S.E.2d 878 (1980); McManis, Personal Liability of State Officials Under State and Federal Law, 9 Ga. L. Rev. 821 (1975).

[5] 3 Am. Jur. 2d 658, §300; *see* Ga. Code Ann. §4-409.

[6] 1 Cowp. 161, 175 (1744).

[7] Bradley v. Fisher, 13 Wall 335, 347 (1872).

[8] Stump v. Sparkman, 435 U.S. 349, 356 (1978).

[9] Imbler v. Pachtman, 424 U.S. 409 (1976).

[10] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[11] *Id.* at 555.

[12] Barr v. Matteo, 360 U.S. 564, 574 (1959) (four Justices, with one Justice concurring in result).

tional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business."[13]

THE FEDERAL DOCTRINE OF LIMITED IMMUNITY AS APPLIED TO STATE OFFICIALS

Individual Liability

Following the Civil War, the Fourteenth Amendment was ratified as a limitation upon the powers of state officials. Congress also passed a number of civil rights statutes the very purpose of which was to establish both civil and criminal liability of state officials for wrongful invasion of the federal statutory and constitutional rights of citizens. *See* 42 U.S.C. §§1983, 1985, *et seq*..Notwithstanding, the United States Supreme Court still applied the doctrine of immunity to state legislators in its 1951 decision in *Tenney v. Brandhove*.[14] Later decisions applied absolute immunity under the civil rights statutes to state court judges[15] and state prosecuting attorneys.[16] The Court's first definitive decision regarding the immunity of state executive officials came in *Scheuer v. Rhodes*,[17] which involved suits for damages against the Governor, Adjutant General and other officers and enlisted members of the Ohio National Guard, for wrongful death and injuries with respect to students involved in the 1970 civil disorders at Kent State University. In this case, the Court rejected a claim of absolute immunity, even on the part of the Governor of a State, and held that:

> . . . [I]n varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[18]

One year later, the Court decided the landmark case of *Wood v. Strickland*.[19] In that case, two 16 year-old students had "spiked the punch" at a school-sponsored function. At a subsequent meeting of the board of education, they were expelled from school for the remainder of the semester, a period of 3 months. The students did not receive notice of charges, nor an opportunity to present a defense beforehand, although the board did hold another meeting two weeks later at which the girls, their parents and their counsel appeared and discussed the matter. Asserting due process claims, the students brought an action for damages under the civil rights statute, 42 U.S.C. §1983, against the members of the school board, two school administrators, and the district.

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[13] Butz v. Economou, 438 U.S. 478, 507 (1978). This case upheld an absolute privilege, however, for federal hearing examiners, agency officials who have the responsibility and discretion to decide whether to initiate charges, and the agency attorney who presents evidence in a hearing.

[14] 341 U.S. 367 (1951).

[15] Pierson v. Ray, *supra*, n. 10; Stump v. Sparkman, *supra*, n. 8.

[16] Imbler v. Pachtman, 424 U.S. 409 (1976).

[17] 416 U.S. 232 (1974).

[18] *Id.* at 247-8.

[19] 420 U.S. 308 (1975).

The district court granted a directed verdict for the board members on the ground that they were immune absent proof of malice in the sense of ill will. The court of appeals reversed, holding that there was no evidence supporting the expulsion, based on its interpretation of the school regulation relied on for the board's action. The Supreme Court granted certiorari, and disapproved the findings of no evidence by the court of appeals. In strong language, the Court declared that:

> "It is not the role of the federal courts to set aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion," and that Section 1983 does not confer the right to "relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations."[20]

With respect to the immunity issue, the Court stated the test in these terms:

> . . . [W]e hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. at 557, 18 L. Ed. 2d 288. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[21]

Because the lower courts had not considered the procedural due process issue, the judgment was vacated and the case sent back for consideration of this issue.[22]

The Two-Part Test Restated

Three years later in *Procunier v. Navarette*,[23] the Supreme Court pointed out that the *Wood* case established a two-part test. The first is objective, and the second is subjective.[24]

- **First—Objective Test**

The objective part of the test poses three questions: (1) Was the constitutional right infringed by the state officials clearly established at the time? (2) Did the defendants know of the right or should they have known thereof? and (3) Did they know or should they have known that their conduct violated the constitu-

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[20] *Id.* at 326.

[21] *Id.* at 322.

[22] On remand, the court of appeals held that procedural due process had been violated, and remanded to the district court to consider the issue of immunity on the original record. Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975).

[23] 434 U.S. 555, 562 (1978).

[24] The terms "objective" and "subjective" were not used by the Supreme Court, but have appeared in lower federal court decisions. *See* Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979); Eckerd v. Indian River School District, 475 F.Supp. 1350 (D. Del. 1979); McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).

tional norm?[25] In cases since that time, many lower federal courts seem to overlook the second and third inquiries and give consideration only to the first, i.e., was the constitutional right clearly established?[26]

- **Second—Subjective Test**

The subjective part of the *Wood* test asks whether the defendant acted with malicious intention to deprive the plaintiff of a constitutional right or to cause him injury. While the first test almost always will be a question of law, the second will usually be a question of fact, requiring a trial on the merits, as it involves the state of the defendant's mind. This aspect of the test, of course, proved to be burdensome, and became the subject of the next decision in the evolution of the present law governing immunity.

The Subjective Test Abandoned—The Current Law

The decision that established the current law, *Harlow v. Fitzgerald*,[27] considerably strengthened the qualified immunity defense.

In the *Harlow* case, Ernest Fitzgerald, an analyst with the Department of the Air Force, had testified before a congressional committee about cost overruns and technical difficulties involved with the development of the C-5 airplane. Subsequently, he lost his job and then filed suits against President Nixon as well as several of his aides. In a companion case, the Supreme Court held that the President was entitled to absolute immunity in connection with his actions,[28] but in the case of Messrs. Harlow and Butterfield, Nixon's aides, the Court held that they were entitled only to limited immunity, unless on remand they could establish that as presidential aides, "their responsibilities . . . embraced a function so sensitive as to require a total shield from liability."[29] However, the Court went further and declared that it would no longer recognize the subjective limitation upon qualified immunity. In other words, a plaintiff could penetrate immunity only by showing that his clearly established statutory or constitutional rights were violated, and that a reasonable person should have known thereof. It no longer suffices to show malice in fact where the rights are not clearly established. However, "immunity generally is available only to officials performing discretionary functions."[30] As thus refined, the qualified or limited immunity defense was stated as follows:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. * * * On summary judgment the judge appropriately may determine, not only the currently applicable law, but whether that law was

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[25] 434 U.S. at 562. *See also* Fujiwara v. Clark, 477 FSupp. 822 (D. Haw. 1979), *rev'd*, 703 F.2d 357 (9th Cir. 1983) (all 3 components of the first branch of the *Wood* test were applied).

[26] *See, e.g.*, Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975), *cert. denied*, 423 U.S. 834 (1975).

[27] 457 U.S. 800 (1982).

[28] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[29] Harlow v. Fitzgerald, 457 U.S. at 812-813.

[30] *Id.* at 816. The Fifth Circuit has held that the immunity defense varies according to the scope of the official's discretion and responsibility, McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980), and that it is not applicable to a §1983 action or false imprisonment, since such an act does not involve discretion. Bryan v. Jones, 519 F.2d 44 (5th Cir. 1975), *cert. denied*. 429 U.S. 865 (1976).

> clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained.[31]

The Court expanded the immunity defense out of concern that the subjective limitation upon immunity invariably subjected the official to the expense and worry of a trial on the merits. The likelihood of a full-scale trial tended to have a deleterious effect upon the policy considerations implicit in the immunity defense, i.e., the desire that public employees and officials vigorously perform their duties on behalf of the public without being intimidated by the fear of frivolous lawsuits. By narrowing the limitations on the immunity defense to only one, the objective restriction, the Court insures that the defense will be determined at an early stage of the case before a great deal of discovery and other expense has been incurred.[32]

After *Harlow*, at least two lower court cases held that even where the defendant failed to prevail on summary judgment, he might nevertheless escape liability by proving at the trial that he acted with subjective good faith;[33] but in *Davis v. Scherer*,[34] the Supreme Court rejected this proposition outright, declaring that the defense depends solely upon the objective component, and that "[n]o other circumstances are relevant to the issue of qualified immunity."[35]

In applying the *Harlow* qualified immunity defense, a court should only consider whether the plaintiff had clearly established federal constitutional rights, since immunity is not defeated when the officer's conduct violates a state administrative regulation. However, it should be emphasized that "[i]mmunity generally is available only to officials performing discretionary functions".[36]

In *Mitchell v. Forsyth*,[37] the Supreme Court held that where a particular question had not been definitively decided, and government officials had during the intervening period followed the practice in question, qualified immunity would apply even though the illegality of the practice could have been extrapolated from general principles established prior to the act in question.

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[31] *Id.* at 818-819.

[32] *Id.* at 807-808.

[33] McElveen v. Prince William County, 725 F.2d 954 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 88 (1984); Bier v. Fleming, 717 F.2d 308 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1283 (1984).

[34] _____U.S._____, 104 S.Ct. 3012 (1984).

[35] *Id.* This decision necessarily rejects such decisions as Williams v. Treen, 671 F.2d 892 (5th Cir. 1982), *cert. denied*, 459 U.S. 1126 (1983).

[36] Harlow v. Fitzgerald, 457 U.S. at 816; Williams v. Treen, 671 F.2d 892, 897 (5th Cir. 1982), *cert. denied*, 459 U.S. 1126 (1983); *cf.* Nelson v. Spalding County, 249 Ga. 334, 336, 290 S.E.2d 915 (1982); *see* note 32, *supra*.

[37] _____U.S._____, 105 S.Ct. 2806 (1985).

Officials Entitled to Absolute or Qualified Immunity

Some officials are entitled to absolute immunity, such as legislators,[38] judges,[39] the President,[40] prosecuting officials,[41] administrative law judges,[42] executive officers engaged in adjudicative functions,[43] aides to Senators and Representatives, as to matters protected by the Speech and Debate Clause,[44] witnesses, with respect to their testimony, even as to perjured testimony presented by a police officer,[45] and possibly a presidential aide who can show that "the responsibilities of his office embraced a function so sensitive as to require a total shield from liability."[46]

On the other hand, only a limited or qualified immunity applies to school officials,[47] state governors and other executive officials,[48] cabinet officials,[49] the Attorney General of the United States when not acting in his prosecutorial but only in his investigative role,[50] public defenders,[51] a private person who is subject to a §1983 action by virtue of his acting "under color of law,"[52] and a person asserting an immunity from slander or libel, by virtue of the "petition" clause of the First Amendment.[53]

POSSIBLE EXTENSION OF ABSOLUTE IMMUNITY TO SCHOOL BOARDS

It is anomalous that judges, who not only have a greater knowledge of law and who have comparatively unlimited time to research, study and reflect on such questions, enjoy an absolute immunity, whereas school boards, who have no such knowledge and often have to make quick decisions, have only a limited immunity. However, two decisions of the Supreme Court offer the promise, at least, of an extension of absolute immunity to school boards in the exercise of their two most often used powers, legislative and quasi-judicial.

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[38] Tenny v. Brandhove, 341 U.S. 367 (1951); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

[39] Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). Immunity applies even where the judge singles out a juror and condemns him for his verdict. Emory v. Peeler, 756 F.2d 1547 (11th Cir. 1985).

[40] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

[41] Imbler v. Pachtman, 424 U.S. 409 (1976).

[42] Butz v. Economou, 438 U.S. 478 (1978).

[43] *Id.*; Harlow v. Fitzgerald, 457 U.S. at 807.

[44] Gravel v. United States, 408 U.S. 606, 616 (1972).

[45] Briscoe v. Lahue, 460 U.S. 325 (1983); Charles v. Wade, 665 F.2d 661 (5th Cir. 1982), *cert. denied*, 460 U.S. 1036 (1983).

[46] Harlow v. Fitzgerald, 457 U.S. at 812-813.

[47] Wood v. Strickland, 420 U.S. 308 (1975).

[48] Scheuer v. Rhodes, 416 U.S. 232 (1974).

[49] Butz v. Economou, *supra*, n. 42.

[50] Mitchell v. Forsyth, ____U.S.____, 105 S.Ct. 2806 (1985).

[51] Tower v. Glover, ____U.S.____, 104 S.Ct. 2820 (1984).

[52] Folsom Investment Co. v. Moore, 681 F.2d 1032 (5th Cir. 1982).

[53] McDonald v. Smith, ____U.S.____, 105 S.Ct. 2787 (1985). *See also*, Windsor v. The Tennessean, 719 F.2d 155 (6th Cir. 1983), *reh. denied*, 726 F.2d 277 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 105 (1984).

In *Lake Country Estates v. Tahoe Regional Planning Agency*,[54] the Supreme Court held that the Tahoe Regional Planning Agency, an entity created by compact between California and Nevada, is entitled to the same absolute immunity, with respect to the exercise of its legislative or rule-making powers, which would be enjoyed by state legislators. Arguably, the same reasoning should apply to public school boards, although the Court expressly reserved judgment on the question as to whether the rule applied to local legislative officials.[55]

In *Butz v. Economou*,[56] the Court held that the absolute immunity accorded judges also applied to federal hearing examiners, when acting in their official hearing capacities. In so holding, the Court referred to the similarity between the procedures employed and the functions performed by these officials, to those of courts.

When a school board adopts a policy to govern future transactions, it is doing the same thing that a state legislature does, and when it conducts a hearing on a teacher dismissal or student expulsion matter, it is performing the same function as a court. It is therefore reasonable to conclude, in the light of the *Tahoe Regional Planning Agency* and *Butz* cases, that boards should enjoy the same immunity. These contentions should be urged in appropriate cases.

LIABILITY OF THE BOARD—OFFICIAL CAPACITY LIABILITY

To be distinguished from board members *individual* liability, is the entirely separate and distinct problem of board member *official* liability, which is "only another way of pleading an action against an entity of which an officer is an agent."[57]

Originally, under the 1961 Supreme Court decision in *Monroe v. Pape*,[58] municipalities and other similar public bodies were not considered "persons" within the meaning of 42 U.S.C. §1983, the federal civil rights statute most frequently relied upon by plaintiffs suing school boards, with the result that such public bodies enjoyed immunity from damages thereunder. However, *Monell v. New York City Department of Social Services*,[59] overruled *Monroe v. Pape* in part. The Court in *Monell* held that municipalities and other public bodies were subject to liability under §1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." The Court made clear, however, that a municipality would not be liable solely because it employs a wrongdoer.[60] When a public body is subject to liability under the test established in the *Monell* decision, it cannot assert an immunity based on the good faith of its officers as a defense, similar to what the officers themselves might assert when they are sued individually.[61]

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[54] 440 U.S. 391 (1979).

[55] *Id.* at n. 26.

[56] 438 U.S. 478, 512-513 (1978).

[57] Monell v. New York City Department of Social Services, 436 U.S. 658, 690 n. 55 (1978).

[58] 365 U.S. 167 (1961), *overruled in part*, Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).

[59] 436 U.S. 658 (1978).

[60] 436 U.S. at 690-691. On the other hand, the Court noted that "policy" need not necessarily be one formally adopted.

[61] Owen v. City of Independence, 445 U.S. 622 (1980).

The Supreme Court decision in *State of Maine v. Thiboutot*,[62] has substantially broadened the potential liability of state officials under the civil rights statute, 42 U.S.C. §1983. In this case, the Court held that the statute encompasses claims based on purely statutory violations of federal law, and that coverage of §1983 is not limited to claims based on constitutional rights or laws providing for equal rights, as had been previously assumed by many attorneys. Consequently, the section can be used to support such non-civil right statutory claims as those arising under the AFDC benefit provisions of the social security law, as well as many other federal statutes, some 28 of which were set forth in an appendix to Mr. Justice Powell's dissenting opinion.

However, §1983 does not apply to federal officials, thereby encouraging plaintiffs to concentrate on state defendants even in cases where joint federal-state action is involved, as is usually the case in federal grant situations. The Court also held that the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988, is equally applicable to all §1983 actions, whether brought in state or federal court.

In *Maher v. Gagne*,[63] decided the same day, the Court held that attorneys' fees could be awarded under §1988 where the plaintiff prevailed through a settlement rather than a trial, and that an award of attorneys' fees against a state under §1988 was not barred by the Eleventh Amendment. The Court did not decide, however, whether a federal court would award fees against a state based on a statutory, non-civil rights claim.

In *Brandon v. Holt*,[64] the Court reiterated that a suit against a public official in his official capacity is in effect a suit against the state or political subdivision of which he is an official; in those cases where the political subdivision or state is subject to liability, an attorneys' fees award is recoverable against the political subdivision or state although it was not formally named in the pleadings. Conversely, when the suit names the official in his individual or personal capacity, liability for fees or other expenses cannot be imposed upon the governmental entity.[65]

In addition to the imposition of liability on public bodies defined by *Monell*, there are other situations where Congress has expressly established liability by statute.[66]

WHAT IS A "POLICY" FOR PURPOSES OF MONELL—NEGLIGENCE

The easy case occurs where a school board adopts a maternity leave policy invalid on its face because of due process or other constitutional infirmities.[67] Suppose, however, that the policy-making body (such as a board of education) has not acted so formally, but has simply tolerated acts of constitutional violations by its servants. Stated differently, can liability be imposed based on negligence,

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[62] 448 U.S. 1 (1980).

[63] 448 U.S. 122 (1980).

[64] _____U.S._____, 105 S.Ct. 873 (1985).

[65] Kentucky v. Graham, _____U.S._____, 105 S.Ct. 3099 (1985).

[66] Examples are under Title VII and the Equal Pay Act, 29 U.S.C. §206; Burkey v. Marshall County Board of Education, 513 FSupp. 1084 (N.D. W. Va. 1981), and liability for attorneys' fees under 42 U.S.C. §1988, even in cases where only injunctive relief is granted. Hutto v. Finney, 437 U.S. 78 (1978).

[67] *See, e.g.*, Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

either: (1) as to acts of negligence by the employee, or (2) because of negligence of the board in failing to take remedial action? *Parratt v. Taylor*[68] resolves the first proposition: A deprivation of property by the negligent action of a state official or employee violates due process and subjects the offender to *personal* liability only where the state fails to provide an adequate remedy for the wrong, such as general tort principles or a tort claims act. On the other hand, the Court noted, a rule permitting a §1983 action in cases where it is impracticable to provide a pre-deprivation hearing would "make of the Fourteenth Amendment a font of tort law."[69]

The Court answered in part the second proposition in its 1985 decision in *Oklahoma City v. Tuttle*,[70] holding that "official policy" within the meaning of *Monell*, could not be inferred, so as to impute vicarious liability to the city, from just a single act of a policeman, regardless of its extraordinary nature as involving an unusually excessive amount of force. A single act does not establish a "policy" of inadequate training by the city, for "the word 'policy' generally implies a cause of action consciously chosen from among various alternatives."[71] Repeated acts of misconduct, unremedied by the city, could well establish "policy" for purposes of *Monell*, however.

The fact that a state follows the doctrine of sovereign immunity with respect to liability for the negligence of its employees, and the employees themselves enjoy a qualified immunity for their negligence, does not mean that the State has not provided an adequate remedy within the meaning of *Parratt*.[72]

WAIVER OF STATE SOVEREIGN IMMUNITY

In addition to the immunity defined by *Monell v. New York City Department of Social Services*, *supra*, the state and its agencies are protected by sovereign immunity under the Eleventh Amendment. The latter bars a federal court from awarding even injunctive relief against state officials based on state law claims, even in cases where relief would be available if a federal violation were shown.[73]

As to both types of immunity, however, the immunity may be found to have been waived. Where Congress acts under the Fourteenth Amendment, as it did in enacting 42 U.S.C. §1988, the attorneys' fees provision, a congressional waiver of the state's immunity may be established.[74] However, in order to effectuate an abrogation of a state's Eleventh Amendment immunity under §5 of the Fourteenth Amendment, there must be "an unequivocal expression of Congressional intent to overturn the constitutionally guaranteed immunity of the several states." Congress did not do so under §504 of the Rehabilitation Act, 29 U.S.C. §794.[75]

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[68] 451 U.S. 527 (1981).

[69] *Id.* at 544.

[70] ____U.S.____, 105 S.Ct. 2427 (1985).

[71] *Id.*

[72] Martinez v. California, 444 U.S. 277 (1980); Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983), *cert. granted*, 105 S.Ct. 1168 (1985); Rittenhouse v. DeKalb County, 764 F.2d 1451 (11th Cir. 1985).

[73] Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).

[74] Hutto v. Finney, 437 U.S. 678 (1978); Odum v. Clark, 748 F.2d 1538 (11th Cir. 1984). Even judges who otherwise enjoy absolute immunity, are subject to an attorneys' fees award in connection with injunctive relief under this section. Pulliam v. Allen, ____U.S.____, 104 S.Ct. 1970 (1984). Virginia Supreme Court v. Consumers' Union, 446 U.S. 719 (1980), S.C. ____U.S.____, 103 S.Ct. 3124 (1983).

[75] Atascadero State Hospital v. Scanlon, ____U.S.____, 105 S.Ct. 3142 (1985).

A state's immunity may be waived by contract with the federal government in connection with a grant program.[76]

A state may waive its immunity by statute, but in order for a consent statute to constitute waiver of the Eleventh Amendment immunity to suit in federal court, it must specify the state's consent to suit in federal court, and that intent must be "unmistakably clear."[77] Where sovereign immunity is abolished by state judicial decision, the resulting "consent to be sued" does not apply to suits in federal court.[78] A county ordinance declaring that the county will pay all judgments rendered against its officials and employees for acts arising out of the performance of their duties has been held a valid waiver as to action in state court.[79]

Waiver as to state court suits also results where a political subdivision procures liability insurance under a statute which declares that in such a case, immunity is waived to the extent of the liability insurance.[80]

PROCEDURAL CONSIDERATIONS

Generally

"Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official";[81] the plaintiff does not have to plead facts showing its inapplicability.[82] The defense can be injected in the case by inclusion in a pretrial order.[83] The burden of proving the defense is also on the official asserting it,[84] except in cases involving suits against prison officials, in which the burden rests on the plaintiff to negate the defense.[85] Where not raised properly in the district court, the qualified immunity defense issue will not be considered on appeal.[86] While the issue, after *Harlow*, will most often be resolved as a matter of law on summary judgment, it may not, as for example, in a search and seizure case, where the issue also remains as to the defendant's good faith belief in the validity of the search under all the circumstances.[87] In those cases where the issue is not resolved on summary judgment, a special verdict with interrogatories should be submitted on the issue. A motion for directed verdict based on the defense also should be made, under the federal rule that the sufficiency of the

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[76] Bennett v. Kentucky Department of Education, _____U.S._____, 105 S.Ct. 1544 (1985).

[77] Atascadero State Hospital v. Scanlon, _____U.S._____, 105 S.Ct. 3142 (1985).

[78] Skehan v. Trustees of Bloomsburg College, 669 F.2d 142 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1048 (1982).

[79] Chatham County Commissioners v. Rumary, 253 Ga. 60, 315 S.E. 2d 881 (1984).

[80] Toombs County, Georgia v. O'Neal, 254 Ga. 390, 330 S.E. 2d 95 (1985).

[81] Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Gomez v. Toledo, 446 U.S. 635 (1980); Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981).

[82] Gomez v. Toledo, *supra*, n. 81.

[83] Wilson v. Attaway, 757 F.2d 1227, 1246 (11th Cir. 1985), *reh'g denied*, 764 F.2d 1141 (11th Cir. 1985).

[84] Dennis v. Sparks, 449 U.S. 24, 29 (1980); Barker v. Norman, *supra*, n. 81.

[85] Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979).

[86] Wells v. Hico Indep. School District, 736 F.2d 243 (5th Cir. 1984), *petition for cert. dismissed pursuant to R.53*, 54 L.W. 3014 (No. 84-545) (U.S. July 1, 1985).

[87] Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984).

evidence generally can not be urged on appeal unless the appealing party made a motion for directed verdict in the district court.[88]

In cases where the availability of the immunity defense is questionable, and liability otherwise seems clear, a tender of settlement should be considered. The tender should be worded to include all claims for attorneys' fees. This may save the defendant from liability for attorneys' fees for services rendered subsequent to the tender. Where the actual verdict amount, plus the attorneys' fees incurred before the tender, equals or exceeds the amount originally tendered, the plaintiff may have to bear the cost of the legal services he received after rejecting the defendant's offer of settlement.[89]

Jury Trial

In a damages action sounding in tort, a jury trial is guaranteed under the Seventh Amendment in federal court actions;[90] also the right to a jury trial in §1983 damage actions is firmly established.[91] On the other hand, there is no right to a jury trial in an equitable action, such as one for injunctive relief only.[92] "... [W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims."[93]

Where claims at law and in equity are joined in the same suit, but the legal claims are tried separately by a jury, the jury's verdict operates as a finding of fact binding on the trial court in its determination of the equitable claim.[94]

It is not clear whether a right to jury trial exists with respect to a case where the only monetary relief sought is back pay, sometimes referred to as part of the equitable remedy of reinstatement. Under Title VII, the right does not exist,[95] but it does under the Equal Pay Act.[96] With respect to actions seeking back pay under the conventional civil rights statutes such as 42 U.S.C. §§1981 and 1983, the law is not clear. Some cases hold that the right does not exist.[97] One case holds that there is no right to a jury trial in an action against the board for back pay, but that

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[88] Wells v. Hico Indep. School District, *supra*, n. 86; *see*, Wright and Miller, *Fed. Prac. & Procedure*, §2536 (1971).

[89] Marek v. Chesny, ____U.S.____, 105 S.Ct. 3012 (1985).

[90] Curtis v. Loether, 415 U.S. 189 (1974).

[91] Burt v. Board of Trustees of Edgefield City School District, 521 F2d 1201 (4th Cir. 1975); Drone v. Hutto, 565 F2d 543 (8th Cir. 1977).

[92] Parsons v. Redford, 28 U.S. 446 (1830).

[93] Ross v. Bernhard, 396 U.S. 531 (1970).

[94] Williams v. City of Valdosta, 689 F2d 964 (11th Cir. 1982); Dybczak v. Tuskegee Institute, 737 F2d 1524, 1526 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1180 (1985).

[95] Curtis v. Loether, *supra*, 415 U.S. at 196; EEOC v. Detroit Edison Co., 515 F2d 301, 308 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977); Johnson v. Ga. Highway Express, Inc., 417 F2d 1122, 1125 (5th Cir. 1969).

[96] Lehman v. Nakshian, 453 U.S. 156 (1981) (right does not exist in an action against the federal government, but rule is otherwise in an action against a state or a political subdivision).

[97] Lynch v. Pan American Airways, 475 F2d 764 (5th Cir. 1973); Grimes v. Pitney-Bowes, Inc., 480 FSupp. 1381 (N.D. Ga. 1979).

the right does exist in a suit against the board members individually.[98] Language in *Curtis v. Loether* supports the right of a jury trial in a §1981 or §1983 case.[99]

Under Rule 38 of the Federal Rules of Civil Procedure, a jury trial must be timely demanded in civil cases. Consequently, a decision on this issue must be made at the outset, by the defendant and his attorney, after considering whether a jury trial would be preferable.

Direct Appeal

In *Nixon v. Fitzgerald*,[100] the Supreme Court held that an order denying *absolute* immunity was subject to immediate appeal, although the case had not been tried on the merits. In 1985, the Court extended the doctrine to an order denying a claim of *qualified* immunity, to the extent that it turns on an issue of law, and conclusively determines the disputed question. The order in question was one denying a motion for summary judgment, which is the manner in which the question usually would be presented. The Court relied on the proposition that the immunity involved is one from suit, not just from liability, and a contrary rule would in all cases compel the official to undergo the expense and ordeal of a trial unnecessarily where it was later determined on appeal that the denial of immunity was improper.

This decision confers a valuable right, one which in most instances should be pursued. It also significantly reduces the burden on defendants to make an early offer of settlement, for an offer now in most all cases should await a ruling on appeal from the immunity issue. Alternatively, it affords the defendant an additional card to play if the issue of settlement does come up.

SPECIAL IMMUNITY FOR LIBEL AND SLANDER CLAIMS

In exercising their duties relative to the evaluation, nonrenewal and discharge of employees, school officials necessarily have to communicate with each other about the qualifications, competency and conduct of those employees. In instances where the employees are terminated, actions for defamation have been brought by the employees claiming damages against their superiors. In connection with such actions, it is important to realize that a separate, independent immunity or privilege usually is recognized by the laws of most states. This immunity was well defined in *Greenya v. George Washington University*:

> It is well accepted that officers and faculty members of educational organizations enjoy a qualified privilege to discuss the qualifications and character of fellow officers and faculty members, if the matter communicated is pertinent to the functioning of the educational institution. Concomitantly we believe the privilege extends to internal records in which such matters are discussed or recorded. For a plaintiff to overcome the privilege he must prove that a publication occurred outside normal channels or that the normal manner of handling such information resulted in an unreasonable degree of publication in light of the purposes of the privilege or the publication was made with malicious intent. Since no evidence was introduced tending to overcome the qualified privilege, a directed verdict was proper as to defamation and punitive damages.[101]

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[98] Burt v. Board of Trustees of Edgefield City School District, *supra*, n. 91.

[99] 415 U.S. at 196-7.

[100] 457 U.S. 731 (1982).

[101] 167 U.S. App. D.C. 379, 512 F2d 556 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 995 (1975). *See also* 50 Am. Jur. 2d 791, §273 *et seq*; Land v. Delta Airlines, 147 Ga. App. 738, 250 S.E.2d 188 (1978); EEOC v. University of Notre Dame, 715 F2d 331 (7th Cir. 1983).

The crucial point is that the statements be made only by someone *having a duty relative to the employee's qualifications*, to another person also *having a legitimate interest therein*.[102]

TO WHAT DAMAGES ARE BOARD MEMBERS SUBJECT?

In an action under 42 U.S.C. §1983, both compensatory and punitive damages are recoverable. Compensatory damages may include damages for mental and emotional distress without proof of actual damage.[103] Back pay may be granted for a period beginning with dismissal and extending up to date of reinstatement.[104] Recovery may, in appropriate cases, include compensation for damage to character and reputation.[105] The award may also include attorneys' fees,[106] (which very often exceed all other damages). In federal court actions, under §1983, recovery cannot be had for injury to name or reputation alone, unaccompanied by dismissal or non-renewal.[107] In student suspension cases, actual injury must be shown; where the suspensions are seen to have been in fact justified, recovery cannot be had for the days lost from school, but only for distress caused from knowledge that due process was denied, and if such distress cannot in fact be proven, only nominal damages can be recovered.[108]

In order to support an award of punitive damages in a § 1983 action, it is not necessary to prove actual malicious intent, ill will or spite, but a reckless or callous disregard of or indifference to, one's rights or safety is sufficient.[109] On the other hand, punitive damages are not recoverable against a municipality or other political subdivision,[110] nor are they recoverable at all in a Title VII case.[111]

In teacher dismissal cases, reinstatement is a proper remedy.[112] Damages may be granted for harassment.[113] Where the amount in dispute is reasonably capable

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[102] *See* Melton v. Bow, 145 Ga. App. 272, 243 S.E. 2d 590 (1978), *aff'd*, 241 Ga. 629, 247 S.E. 2d 100 (1978), *cert. denied*, 439 U.S. 985 (1978), where a $200,000 verdict turned on this very question.

[103] Fujiwara v. Clark, 477 F Supp. 822 (D. Haw. 1979), *rev'd*, 703 F.2d 357 (9th Cir. 1983).*See also* Knapp v. Whitaker, 757 F.2d 827 (7th Cir. 1985).

[104] Zoll v. Eastern Allamakee School District, 588 F.2d 246 (8th Cir. 1978); Shirley v. Chagrin Falls Board of Education, 521 F.2d 1329 (6th Cir. 1975), *cert. denied*, 424 U. S. 913 (1976).

[105] Burt v. Board of Trustees of Edgefield City School District, 521 F.2d 1201 (4th Cir. 1975); Knapp v. Whitaker, *supra*, n. 103; Hinkle v. Christensen, 733 F.2d 74 (8th Cir. 1984).

[106] Hutto v. Finney, 437 U.S. 678 (1978); McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980). Attorneys' fees are recoverable under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988; §718 of the Emergency School Aid Act, 20 U.S.C. §1617; the Voting Rights Act, 42 U.S.C. §19731(e); Title VII, 20 U.S.C. §2000e-5(k), the Rehabilitation Act, 29 U.S.C. §794a(b); and the ADEA, 29 U.S.C. §216(b).

[107] Paul v. Davis, 424 U.S. 693 (1976); Campbell v. Pierce County, Georgia, 741 F.2d 1342 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 1754 (1985).

[108] Carey v. Piphus, 435 U.S. 247 (1978).

[109] Smith v. Wade, 461 U.S. 30 (1983).

[110] City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981); Okeson v. Tolley School Dist., 570 F Supp. 408 (D. N.C. 1983).

[111] Zewde v. Elgin Community College, 601 F Supp. 1237 (N.D. Ill. 1984).

[112] Bueno v. City of Donna, 714 F.2d 484 (5th Cir. 1983); Sterzing v. Fort Bend School Dist., 496 F.2d 92 (5th Cir. 1974); Greminger v. Seaborne, 584 F.2d 275 (8th Cir. 1978). Some courts of appeal award such relief only in cases involving racial discrimination and dismissals violative of the First Amendment. Decker v. North Idaho College, 552 F.2d 872 (9th Cir. 1977).

[113] Behlar v. Smith, 719 F.2d 950 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2169 (1984).

of being ascertained at the time of the act in question, pre-judgment interest may be awarded.[114]

Relief may also include the purging of damaging materials from a student's file,[115] or restoring an academic grade.[116] In employment cases, expunging of records also is an available remedy.[117] Under the EAHCA, retroactive awards of the costs of placement are now available, even where the parents unilaterally place the child pending completion of procedures to effectuate a change.[118]

Title IX confers a private cause of action,[119] as does Title VI,[120] §504,[121] and the EAHCA.[122]

VICARIOUS LIABILITY

Generally, the doctrine of vicarious liability does not apply to civil rights actions, in the sense of rendering a public official liable for the acts of his subordinates.[123] The superior would be liable where he had actual knowledge of the violation and acquiesced therein,[124] or where there is seen to be some causal connection between the supervisory defendant's actions and the constitutional deprivation.[125] Federal principles, not the state laws of agency, govern vicarious liability in federal actions.[126]

STATE LAW CLAIMS

Federal constitutional and statutory damage actions are not the only claims with which school boards must be concerned. Boards must also contend with state laws governing negligence and libel. Two decisions by Georgia courts will illustrate this fact.

In *Melton v. Bow*,[127] a professor at the University of Georgia accused a student-employee of theft of hotplates from the chemistry laboratory, called him a liar, and stated that he was in trouble with IRS. The student sued the professor for libel; a jury awarded him $200,000, and the verdict was upheld on appeal.

In *Webb v. Hennessy*,[128] the principal of a public high school was sued by a student who was injured while falling "through or into a door" at the school. The

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[114] *Id.*

[115] Jackson v. Hayakawa, 761 F.2d 525 (9th Cir. 1985).

[116] Lightsey v. King, 567 FSupp. 645 (E.D. N.Y. 1983).

[117] Guerra v. Roma Indep. School Dist., 444 F. Supp. 812 (S.D. Tex. 1977).

[118] School Committee of Burlington v. Massachusetts Department of Education, ____U.S.____, 105 S.Ct. 1996 (1985).

[119] Cannon v. University of Chicago, 441 U.S. 677 (1979), S.C. 710 F.2d 351 (7th Cir. 1983).

[120] Guardians Association v. Civil Service Commission of New York, 463 U.S. 582 (1983).

[121] Alexander v. Choate, ____U.S.____, 105 S.Ct. 712 (1985).

[122] 20 U.S.C. §1416(e)(2).

[123] Walker v. University of Pittsburgh, 457 F. Supp. 1000 (W.D. Pa. 1978); Ford v. Byrd, 544 F.2d 194 (5th Cir. 1976); Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979).

[124] Walker v. University of Pittsburgh, *supra*, n. 123.

[125] Sims v. Adams, 537 F.2d 829 (5th Cir. 1976).

[126] Baskin v. Parker, *supra*, n. 123.

[127] 145 Ga. App. 272, 243 S.E. 2d 590 (1978), *aff'd*, 241 Ga. 629, 247 S.E.2d 100 (1978), *cert. denied*, 439 U.S 985 (1978).

[128] 150 Ga. App. 326, 257 S.E. 2d 315 (1979).

complaint alleged that the principal had legal custody and control of the premises, and was therefore guilty of negligence in maintaining the school building and permitting a rug and mat to be placed at the door. The Georgia Court of Appeals, disregarding prior decisions, held that the complaint stated a claim, and that the principal was not protected by any immunity.

The Supreme Court of Georgia granted certiorari, and reversed. The court held that immunity applied because the principal was acting in an area where he was "vested with discretion and empowered to exercise judgment in matters before (him);" the duties were not ministerial in nature; and there was no allegation that he acted wilfully, wantonly or outside the scope of his authority.[129]

Under the Supreme Court's decision in *Parratt v. Taylor*,[130] the failure of the state to provide an adequate remedy in certain property deprivations may itself constitute a denial of due process, giving rise to a claim maintainable under 42 U.S.C. §1983.

THE IMMUNITY DOCTRINE APPLIED

A number of interesting cases have applied the immunity doctrine.

In *Guerra v. Roma School District*,[131] the board non-renewed the contracts of two teachers, and issued only one-year probationary contracts to two others. The evidence showed that this was in retaliation for these teachers having supported an unsuccessful candidate in the school board election. Consequently, the board action violated the teachers' First Amendment rights of free association. Despite the fact that the board action was taken prior to the Supreme Court decision in *Elrod v. Burns*,[132] holding patronage dismissals unconstitutional, the federal court here reasoned that limited immunity might have protected the defendants were it not for the fact that teachers have always been treated differently from other public employees, even before the *Elrod* case.

The remand of *Wood v. Strickland* itself indicates how close may be some of the questions upon which immunity depends. The court of appeals reasoned that the students were denied due process because they did not receive notice of the time and place of the meeting at which the suspensions took place, nor a copy of the charges; a hearing held two weeks later at which the students did appear, did not satisfy due process, as the board merely ratified its earlier action.[133]

In *Stoddard v. School District of Lincoln County*,[134] a verdict of $33,000 in compensatory damages was awarded to a teacher in her suit against the members of the board of education for refusing to renew her contract. The evidence showed that the reasons given to the teacher were not the real ones underlying the nonrenewal; the court cited the teacher's size, her failure to attend church, the location of her trailer and her personal life, as the actual causes for her dismissal.

In *Schiff v. Williams*,[135] the court upheld an award of compensatory damages against the president of a university for discharging the student editors of the col-

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[129] Hennessey v. Webb, 245 Ga. 329, 264 S.E. 2d 878 (1980).

[130] 451 U.S. 527 (1981).

[131] 444 F. Supp. 812 (D. Tex. 1977).

[132] 427 U.S. 347 (1976). Patronage dismissals have been further restricted by the Court's decision in Branti v. Finkel, 445 U.S. 507 (1980).

[133] Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975).

[134] 429 F. Supp. 890 (D. Wyo. 1977), *aff'd in part, rev'd in part*, 590 F.2d 829 (10th Cir. 1979).

[135] 519 F.2d 257 (5th Cir. 1975), *cert. denied*, 423 U.S. 834 (1975).

lege newspaper for having published materials deemed improper by the president. The court held that this exercise of direct control over a college newspaper violated the First Amendment, and the award of damages was not barred merely because the president acted in good faith on the belief that his action served the best interests of the school, for immunity does not apply where "basic unquestioned constitutional rights" are violated.

In *Eckerd v. Indian River School District*,[136] the court found that plaintiff's dismissal for insubordination violated his First Amendment rights in that it was based on his expressing his disagreement with the board on such things as attendance of the band at rescheduled football games, grading policies and practices, and involvement of band members in the full panoply of musical activities. Three of the defendants carried their burden on one aspect of the qualified immunity rule existing at that time, by testifying that they harbored no ill will toward plaintiff, and reached their conclusions solely on the evidence presented at the hearing. This met the subjective test of *Wood*. As to the objective aspect—knowledge of clearly established constitutional rights—the defendants failed. The board's question to the attorney as to "whether the dismissal would stand up in federal court" cannot be considered as the clear cut, reasoned type of reliance on an attorney's advice which accords immunity.

In *M.M. v. Anker*,[137] the district court had set aside a verdict for the defendant school officials, and entered judgment for plaintiffs on the question of liability in a case for damages brought on the ground that plaintiff students had been subjected to an unreasonable search. The district court referred to the fact that defendants had no information that anything had been stolen, but proceeded to search plaintiff based on the fact that plaintiff M. had been in theft-suspicious situations before; that she was in a classroom where she was not supposed to be, with another child's pocket book under her control, claiming the bag as her own; that she was taking down posters in the classroom to use to decorate her sister's room, and that upon being searched she attempted to refuse access to one object, which appeared to be a marijuana pipe. In the court's view these facts did not constitute reasonable grounds for a search, although they might have afforded a basis for other disciplinary action. Subjective good faith is not sufficient under the Fourth Amendment. The contention that defendants should be afforded a good faith defense because of the uncertainties of the law was rejected, as the defendants were familiar with the reasonable suspicion standard, and should have known that their conduct was unconstitutional within the meaning of *Wood v. Strickland*.

In *Zoll v. Eastern Allamakee School District*,[138] the Eighth Circuit upheld a jury verdict finding that the non-renewal of plaintiff's teaching contract was to retaliate for her having written to the newspapers letters criticizing her principal and superintendent. The appeals court upheld the award of back pay up to the date of trial, and the order that plaintiff be reinstated at the first vacancy for which she qualified. Generally, back pay awards continue until the time of reinstatement.

In *Bertot v. School District of Laramie*,[139] the court of appeals upheld a jury finding that defendant school officials were entitled to immunity with respect to

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[136] 475 F. Supp. 1350 (D. Del. 1979).

[137] 477 F. Supp. 837 (D. N.Y. 979), *aff'd*, 607 F.2d 588 (2d Cir. 1979).

[138] 588 F.2d 246 (8th Cir. 1978).

[139] 522 F.2d 1171 (10th Cir. 1975).

a claim by a teacher who had been non-renewed in violation of his constitutional rights, based upon his having encouraged students in their operation of an underground newspaper, contrary to the wishes of the principal. The court reasoned that at the time of the non-renewal, court decisions had not clearly established that such conduct by the teachers was constitutionally protected, the decision in *Papish v. University of Missouri*[140] having not then been decided.

Stachura v. Truszkowski[141] is particularly interesting and instructive. Stachura taught a Life Science class utilizing a board-approved textbook which contained a rather innocuous chapter on human reproduction. He also showed a film on human reproduction to girls and boys separately, whose parents had executed parental permission slips. Before doing so, he discussed his approach with his principal, who gave his approval. The films also had been shown previously, without any adverse reaction.

This time, however, "all hell broke loose." Mrs. Truszkowski (Mrs. T.) wrote indignant letters and at a board meeting read a statement. Cries immediately went up to "tar and feather" Stachura. The crowd was in an uproar and out of control. Neither the superintendent nor principal defended him. The only "reassurance" extended by the superintendent was to warn Stachura that he was in a "heck of a lot of trouble." He was thereafter suspended without a hearing, but was later offered reinstatement on condition that he accept a reprimand. He refused, and received a reprimand based only on the unsubstantiated allegations in Mrs. T's letter.

Stachura suffered sleepless nights; he was referred to in the media as a "sex maniac"; he became withdrawn from his friends and neighbors; and he slept on the floor so as not to disturb his wife. He brought suit against Mrs. T, the superintendent, school board, principal and other persons. A jury awarded him $18,250 against Mrs. T, and $321,000 punitive and compensatory damages against the board and other defendants. The district court set aside the award against Mrs. T on the ground that her actions were immunized under the First Amendment, but the award against the board members and other school defendants was upheld. The court held that Stachura's procedural due process and First Amendment rights of academic freedom were violated, and that the board's action was "not in good faith."

POINTERS IN AVOIDING LIABILITY

Provide Notice and Hearing

Since a majority of the claims against school boards usually involve procedural due process denials, school boards should be careful to see that any action they take involving such matters as teacher discharge or non-renewal and student suspension is taken only after the notice and hearing required under controlling decisions have been provided, and in a formal setting. In case of doubt, it is usually better to afford more process than is due. The law is so well settled by now on most due process questions as to preclude the immunity defense in a great majority of the factual situations likely to arise.

Censorship—Move with Caution

Any type of school censorship of student publications or other regulation of teacher or student free speech or association is suspect, and should be resorted

[140] 410 U.S. 667 (1973).

[141] 763 F2d 211 (6th Cir. 1984).

to only when necessary, after consultation with a school board attorney having knowledge of First Amendment campus principles, and under a narrowly and carefully drawn regulation.

Maternity Leave Policies—Move with Caution

Maternity leave policies are also suspect, under Supreme Court decisions, and federal law, 42 U.S.C. 2000e(k), and should be carefully reviewed by the school board attorney.

Religion Matters—Move with Caution

School boards are often under pressure to adopt schemes designed to reintroduce prayer or scripture reading in the public schools. The law is now well-settled that this is unconstitutional. No subterfuge, device or disguised scheme will escape condemnation. The very fact that it works to accomplish its objective dooms it to judicial censure.

Do Not Succumb to Inflamed Public Opinion

School boards should act deliberately, soberly and never cowardly succumb to inflamed and irate citizens who appear and make unreasonable, intemperate demands. If it is too hot in the kitchen, get out. Otherwise, in an effort to palliate the mob, board members may subject themselves to a $321,000 verdict as was the case in *Stachura v. Truszkowski, supra*.

Seek Formal Advice of Counsel in Advance

Before taking any action adversely affecting any individual, seek the advice of the school board attorney. This should be done in a formal manner prior to the school board meeting at which the action is to be taken. A spur-of-the-moment inquiry is not likely to be treated as sufficient under decisions recognizing a qualified immunity for action taken on the advice of counsel.

State Grounds for Dismissal at the Outset

In teacher dismissal and non-renewal cases, school administrators and school boards should assert at the outset all the grounds upon which they relied. Often, a school principal will assert vague, mild grounds to support his decision to cover up a more serious ground in order to save embarrassment. If at the hearing, it then develops that the real reason was not as claimed, this tends to discredit the administration, establish bad faith, and invite a damage award by jurors who are appalled at the spectacle of an educated professional person being caught in a lie.

When Sued—Decide Early Whether to Demand a Jury

Where suit is brought in federal court, keep in mind that in most cases, there is a right to a jury trial, but that right must be claimed by a written demand at an early date under Rule 38(b) of the Federal Rules of Civil Procedure. Even where equitable relief is sought, the defendant is entitled to a jury trial on the damage claim, and it should be tried first. A tactical decision must be made as to whether the school board members would fare better before a jury or the judge.

Seek Passage of Laws Authorizing Liability Insurance

Consideration should be given to enactment of a statute such as one passed by the General Assembly of Georgia in 1973,[162] at the urging of Georgia School Boards Association, which authorizes school boards to purchase policies of liability insurance protecting board members and school officials from individual liability for damages. This section provides:

> In addition to other compensation paid to members of the State Board of Education, the State Superintendent of Schools, employees of the State Board of Education, and to members of boards of education, superintendents, teachers, principals, officers and employees of boards of control of cooperative educational service agencies, and other administrators and employees of county and other local public school systems, the State Board of Education, the boards of control of cooperative educational service agencies and the several board of education of counties, cities and independent school systems, whenever created, are hereby authorized, in their discretion, to purchase policies of liability insurance or contracts of indemnity insuring or indemnifying the members of the State Board of Education, State Superintendent of Schools, employees of the State Board of Education, officers and employees of boards of control of cooperative educational service agencies and the members of the boards of education, superintendents, teachers, principals, and other administrators and employees against damages arising out of the performance of their duties or in any way connected therewith, whether based upon negligence, violation of contract rights, or violation of civil, constitutional, common law or other statutory rights, whether State, Federal or both. Such boards may expend State, county, Federal and local funds, or any combination thereof, for such purposes. The amount of such insurance or indemnity shall be in the discretion of the respective board. No action shall be maintained against the person or company issuing such insurance or contracting for such indemnity until final judgment has first been entered against the individual covered by such policy or contract, and the existence of such insurance or indemnity shall not be disclosed nor suggested in any action brought against such individual.

Other provisions declare that the statute shall not be construed as waiving any immunity otherwise existing;[163] that the board may also pay for the defense of such actions;[164] and pay the deductible part in certain instances.[165]

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[162] OCGA §20-2-991.

[163] OCGA §20-2-992.

[164] OCGA §20-2-993.

[165] OCGA §20-2-994.

About NSBA . . .

The National School Boards Association is a not-for-profit organization whose primary mission is the advancement of education through the unique American tradition of local citizen control of, and accountability for, the nation's public schools. In this way, education policy is decided by local school board members who are directly accountable to the community. NSBA promotes the quality of education through services to state school boards associations and local school districts. It represents school boards' interests in Washington, D.C., before Congress, federal education agencies, and other national regulatory bodies.

Active Members of NSBA include the 49 state school boards associations and the boards of education of Hawaii, the District of Columbia, and the U.S. Virgin Islands. In addition, approximately 1,900 school systems are members of NSBA's Direct Affiliate program. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

NSBA is located in the metropolitan Washington, D.C. area at 1680 Duke Street, Alexandria, Virginia 22314. For more information about NSBA, write or call (collect) 703/838-NSBA.

About the NSBA Council of School Attorneys . . .

Under the aegis of the National School Boards Association, the Council of School Attorneys was organized in 1969 to provide a national forum on the practical legal problems faced by local public school districts and the attorneys who serve them. In this way, the Council works to promote closer relationships among school attorneys, client school boards and state associations of local school boards. The Council has more than 1800 members, with representatives from almost every state and the District of Columbia.

Membership in the Council is open to attorneys at law who are licensed to practice before the highest court of any state of the U.S. or before a court of record of the U.S.; and who are (or have been within the immediate past 2 years) attorneys for a local public school district, a state association of local school boards or any public junior or community college. The entire membership of any state council of school attorneys sponsored or recognized by a state association of local boards affiliated with NSBA may secure integrated membership with the Council.